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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
KELLY LYNN FULTON,  
  
Defendant and Appellant.

C058650  
  
(Super. Ct. No.  
07F05619)

A jury convicted defendant Kelly Lynn Fulton of assault with a firearm (Pen. Code, § 245, subd. (a)(2)–count one)<sup>1</sup> and brandishing a firearm in the presence of a peace officer (§ 417, subd. (c)–count four). In connection with count one, the jury found that defendant personally used a firearm. (§ 12022.5.) The jury acquitted defendant of felony elder abuse. (§ 368,

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<sup>1</sup> All further statutory references are to the Penal Code.

subd. (b)(1)-count three.) The jury deadlocked on a charge of false imprisonment (§ 236-count two) and a mistrial was declared on that count, which the court subsequently dismissed pursuant to the People's request.

Sentenced to state prison for an aggregate term of five years, defendant appeals. He raises several issues with respect to his conviction for brandishing a firearm: (1) insufficient evidence supports his conviction, specifically that he was in the immediate presence of a peace officer; (2) the trial court failed to instruct sua sponte on the meaning of "immediate presence"; (3) the trial court failed to instruct sua sponte on the lesser included offense of misdemeanor brandishing; (4) the prosecutor misstated the meaning of "immediate presence" during closing argument; and (5) defendant was denied due process as a result of cumulative error.<sup>2</sup> We will affirm the judgment.

#### **FACTS**

About 7:00 p.m. on May 26, 2007, defendant's mother, Marilyn Fulton, called 911 and reported that defendant was threatening her with a gun.<sup>3</sup> Defendant had loaded the sawed-off shotgun in the living room of their apartment and announced that he planned to kill her, himself, and anyone who came through the

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<sup>2</sup> We granted defendant's motion to strike his contention with respect to presentence custody credit, which he subsequently resolved in the trial court.

<sup>3</sup> To avoid confusion, we will refer to defendant Kelly Fulton as defendant and to Marilyn Fulton as Marilyn.

door. Marilyn also reported that defendant was bipolar and had "lost it" after his doctors changed his medication. While on the phone with 911 dispatch, Marilyn screamed, "AAH! Don't . . . (crying) No don't point at me. Don't point that at me." Defendant is heard yelling in the background, "Tell them they got five minutes and it's over. [¶] . . . [¶] Five minutes, motherfuckers. Five fucking minutes. Five fucking minutes. Either here or it's there. You got it? Fuck you." Defendant threatened to kill the police if they took longer than five minutes to arrive but said he would surrender if they arrived within five minutes. Marilyn stated that defendant had cocked the gun and put it under his chin. Defendant got on the phone and the dispatcher explained to him that he heard the sirens, that the officers were there, and that defendant needed to lower his gun. Defendant said he would go outside with the gun and get on the ground as soon as he saw an officer.

Sacramento County Deputy Sheriff Matt Silva, in uniform and in a marked patrol car with lights and siren activated, went to an apartment on a report of an armed man arguing with his mother and threatening to kill his mother and others. Deputy Sheriff Chris Baker and about six other officers, all in uniform, were also there. While the officers discussed their plan, they heard a loud shotgun blast. They approached the apartment and stood behind a fence to get a better view. Deputy Silva backed up a small hill to look over the fence. He saw defendant from the waist up in the driveway, about 70 feet away. Some cars and the fence blocked the lower portion of defendant's body. Deputy

Silva ordered defendant at gunpoint several times to drop his gun and to put his hands up. Instead, defendant turned toward Deputy Silva and started yelling at him. Defendant seemed very angry. Defendant raised his arm with what appeared to be a shotgun, pointed it at Deputy Silva, and stepped toward the officer. Deputy Silva saw no one else at whom defendant could have been pointing the weapon. Deputy Silva again ordered defendant to drop the weapon and raise his hands. Defendant failed to comply. Deputy Silva was in defendant's line of fire. Deputy Silva and another officer got back behind the fence and then ran around the complex. They later approached and found defendant shot in the stomach, lying in the driveway with the shotgun beside him.

While in her car, Rhonda Moran, the apartment manager, witnessed part of the encounter between defendant and the officers. She saw eight to ten uniformed officers in the area around the apartment complex. Defendant was holding a shotgun under his chin. She then saw defendant point the shotgun toward a group of officers in the open who were attempting to communicate with him. She put her car in reverse and when she looked up, she observed defendant lying on the ground.

Marilyn testified at trial. She denied that she had felt threatened by defendant and denied that he pointed the shotgun directly at her. She claimed defendant had been drinking. Marilyn had explained to Deputy Baker that defendant became very angry after arguing with his brother on the telephone. Defendant told his mother he was "sick and tired of being blamed

for everything. Marilyn told Deputy Baker that defendant had threatened to kill her and that she was fearful. Marilyn stated that she and defendant heard the sirens and knew the officers were in front of the apartment. Marilyn denied that defendant forced her to remain in the apartment. When she went outside on the porch, she neither heard nor saw any officers until after defendant was shot.

Defendant testified. He explained that he was feeling suicidal and blamed his medications. He denied that he was angry with Marilyn and denied pointing the gun at her. When confronted with the transcript of the 911 call, he admitted he might have waved the gun around when Marilyn was on the phone. He claimed that he planned to kill himself and went outside so Marilyn would not see. Outside, he denied that he saw any officers but admitted he had heard sirens. He stumbled and the gun accidentally fired. He was then shot.

## **DISCUSSION**

### **I**

Defendant contends insufficient evidence supports his conviction for brandishing a firearm in the presence of a peace officer. He challenges only the requirement that he was in the "immediate presence" of the officer. We conclude that more than sufficient evidence supports his conviction.

"To determine sufficiency of the evidence, we must inquire whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. In this process we must view the evidence in the light most favorable to the judgment and presume

in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. To be sufficient, evidence of each of the essential elements of the crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole.' [Citation.]" (*People v. Carpenter* (1997) 15 Cal.4th 312, 387.)

Section 417, subdivision (c) provides: "Every person who, in the immediate presence of a peace officer, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner, and who knows, or reasonably should know, by the officer's uniformed appearance or other action of identification by the officer, that he or she is a peace officer engaged in the performance of his or her duties, and that peace officer is engaged in the performance of his or her duties, shall be punished by imprisonment in a county jail for not less than nine months and not to exceed one year, or in the state prison."

Deputy Silva stood up on a hill, behind a fence, and saw defendant from the waist up, standing in the driveway. Deputy Silva ordered defendant to drop his weapon and show his hands. Defendant turned toward Deputy Silva, took two steps in the officer's direction, and pointed his gun. Deputy Silva testified that he was in defendant's line of fire. Moran saw defendant point his gun at a group of officers who were attempting to communicate with defendant. Defendant complains that 70 feet separated him and the officers and that a car was parked between them. Deputy Silva testified that some cars and

the fence blocked only the lower portion of defendant and that he (Deputy Silva) was in defendant's line of fire. Overwhelming evidence supports the conclusion that defendant was in the immediate presence of an officer. Defendant does not challenge the evidence with respect to the remaining elements and we will not discuss the evidence further.

## II

Defendant contends the trial court failed to instruct sua sponte on the meaning of "immediate presence." We conclude that the term "immediate presence" required no further definition; thus, defendant's contention is forfeited by counsel's failure to request clarification or amplification.

The trial court instructed the jury in the language of CALCRIM No. 981 as follows: "The defendant is charged in Count Four with brandishing a firearm in the presence of a peace officer in violation of Penal Code section 417(c).

"To prove that the defendant is guilty of this crime, the People must prove that, one, the defendant drew or exhibited a firearm in the immediate presence of a peace officer; two, the defendant drew or exhibited the firearm in a rude, angry, or threatening manner; and three, when the defendant acted, the officer was lawfully performing his duties; and four, when the defendant acted, he knew, or reasonably should have known, from the person's uniform or other identifying actions that the person was a peace officer who was performing his duties.

"A firearm is any device designed to be used as a weapon from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.

"It is not required that the firearm be loaded.

"A person who is employed as a police officer by the Sacramento County Sheriff's Department is a peace officer."

"'[I]t is the trial court's duty to see that the jurors are adequately informed on the law governing all elements of the case to the extent necessary to enable them to perform their function. . . . A trial court has a sua sponte duty (1) to instruct on general principles of law relevant to issues raised by the evidence [citation]; and (2) to give explanatory instructions when terms used in an instruction have a technical meaning peculiar to the law [citation].' [Citations.]"  
(*People v. Enriquez* (1996) 42 Cal.App.4th 661, 665.)

"Although trial courts, generally, have a duty to define technical terms that have meanings peculiar to the law, there is no duty to clarify, amplify, or otherwise instruct on commonly understood words or terms used in statutes or jury instructions. 'When a word or phrase "'is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request.'" [Citations.] A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning.

[Citation.]' [Citation.]" (*People v. Griffin* (2004) 33 Cal.4th 1015, 1022-1023.)

Defendant concedes that there is no authority requiring the trial court to define "immediate presence" as that term is used in section 417, subdivision (c). He claims the purpose of the statute and the use of the term "presence" in other parts of the statute, rather than "immediate presence,"<sup>4</sup> means that "immediate

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<sup>4</sup> Section 417 provides, in relevant part, as follows:

"(a)(1) Every person who, except in self-defense, in the presence of any other person, draws or exhibits any deadly weapon whatsoever, other than a firearm, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a deadly weapon other than a firearm in any fight or quarrel is guilty of a misdemeanor, punishable by imprisonment in a county jail for not less than 30 days.

"(2) Every person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a firearm in any fight or quarrel is punishable as follows:

"(A) If the violation occurs in a public place and the firearm is a pistol, revolver, or other firearm capable of being concealed upon the person, by imprisonment in a county jail for not less than three months and not more than one year, by a fine not to exceed one thousand dollars (\$1,000), or by both that fine and imprisonment.

"(B) In all cases other than that set forth in subparagraph (A), a misdemeanor, punishable by imprisonment in a county jail for not less than three months.

"(b) Every person who, except in self-defense, in the presence of any other person, draws or exhibits any loaded firearm in a rude, angry, or threatening manner, or who, in any manner, unlawfully uses any loaded firearm in any fight or quarrel upon the grounds of any day care center, as defined in Section 1596.76 of the Health and Safety Code, or any facility

presence" as used in subdivision (c) has a technical meaning. We disagree.

"When the evidence shows the weapon was exhibited in a rude, angry or threatening manner, the offense is complete." (*People v. Mercer* (1980) 113 Cal.App.3d 803, 806.) "[T]he chief evil to be avoided by criminalizing exhibition of weapons is the potential for further violence . . . ." [Citation.]" (*People v. Hall* (2000) 83 Cal.App.4th 1084, 1092.) This is the purpose of subdivisions (a) through (c) of section 417, and those subdivisions all refer to "presence." The issue is the meaning of "immediate." This is a commonly understood word and its use in conjunction with "presence" did not create a technical term.

Defendant argues the difference between "presence" and "immediate presence" "lies in the attenuation between the exhibition of the weapon and the people in whose presence the weapon is exhibited." Following a lengthy and, in our view, labored analysis of the two terms, defendant proposes definitions that he contends the trial court should have given sua sponte: Presence means "'in such proximity to the person before whom the firearm is exhibited that a person observing the conflict and the firearm exhibition would reasonably be led to

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where programs, including day care programs or recreational programs, are being conducted for persons under 18 years of age, including programs conducted by a nonprofit organization, during the hours in which the center or facility is open for use, shall be punished by imprisonment in the state prison for 16 months, or two or three years, or by imprisonment in a county jail for not less than three months, nor more than one year."

intervene in the conflict on the belief that one or more of the parties to the conflict was in great danger.'" Immediate presence adds the qualifier: "'and proximity of the weapon to the person before whom it is exhibited is not attenuated by time, distance, or other intervening objects or circumstances.'" We are not persuaded, but even if the trial court had given instructions similar to those now proposed by defendant, there is no likelihood that defendant would have obtained a more favorable result.

"An instruction that omits a required definition of or misdescribes an element of an offense is harmless only if 'it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" [Citation.] 'To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' [Citation.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 774.) "We must determine "' . . . whether the evidence eliminates any reasonable doubt that a defendant would have been convicted under proper instructions." [Citation.]" [Citation.]" (*People v. Ryan* (1999) 76 Cal.App.4th 1304, 1320-1321.)

The evidence was overwhelming, and there was no prejudicial error.

### III

Defendant next contends that the trial court failed to instruct sua sponte on the lesser included offense of misdemeanor brandishing. We reject this claim.

"[A] trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present." (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) "Conversely, even on request, the court 'has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction.' [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) "On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense." (*Ibid.*)

Defense counsel did not request the lesser offense instruction with respect to count four. On appeal, the People do not dispute that misdemeanor brandishing (§ 417, subd. (a)(2)—brandishing in the presence of another person) can be a lesser included offense but argue there was no substantial evidence to support the lesser charge. The court commented that evidence would not support the lesser included offense. We agree. The evidence showed that defendant took the gun outside in the presence of many officers and pointed it at one or more officers. Deputy Silva saw no one else at whom defendant was pointing a weapon. There was no evidence to refute that defendant knew or reasonably should have known that Deputy Silva, standing in uniform, was a peace officer. In any event,

there was no prejudicial error because the evidence was overwhelming. (*People v. Sakarias* (2000) 22 Cal.4th 596, 621.)

#### IV

Finally, defendant contends the prosecutor misstated the meaning of "immediate presence" during closing argument. We reject this claim.

The prosecutor argued that Deputy Silva did not have to stand "right in front of the defendant" for "immediate presence" to be satisfied. The prosecutor stated, "If a grown, trained officer at six foot one sees a guy holding -- pointing a shotgun in his direction, and the sight of that makes a grown man, with his training [and] with his own shotgun, run for his life down a breezeway so he can get cover, that's immediate presence, okay? In the line of fire? Yes."

Defense counsel objected on the ground that the prosecutor misstated the law. The trial court overruled the objection, stating, "It's argument. I will so instruct the jury." The court later instructed on the elements of the offense and informed the jury that if statements of counsel conflicted with the instructions, the instructions applied. (CALCRIM No. 200.)

The prosecutor did not misstate the law. The prosecutor stated that the deputy did not have to stand "right in front of the defendant" for "immediate presence" to be satisfied. The prosecutor stated that "immediate presence" was required and argued her interpretation of that requirement based on the evidence. Deputy Silva testified that he was in defendant's line of fire. We find no error.

We reject defendant's claim that he was denied due process as a result of cumulative error.<sup>5</sup>

**DISPOSITION**

The judgment is affirmed.

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RAYE, J.

We concur:

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SCOTLAND, P. J.

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NICHOLSON, J.

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<sup>5</sup> The recent amendments to section 4019 do not operate to modify defendant's entitlement to credit, as he was committed for a violent felony. (§§ 667.5, subd. (c)(8), 2933.1, 4019, subds. (b), (c); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)